seq. (Count V), and violations of the Illinois Consumer Fraud & Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, § 261 *et seq.* (Count VI).

All six counts are based on the same principal allegations of overcharge and fraud. Plaintiffs essentially allege that defendants charged plaintiffs and other long distance subscribers rates in excess of the tariffs filed with the FCC. These overcharges were allegedly accomplished in three ways: (1) by inflating the distance in miles for "800 service" calls, for which charges are based on the distance between the network switching center and the place called; (2) by inflating the mileage component for normal calls placed through new switching centers, and (3) by billing calls to cities in the Allnet systems, for which lower rates were to be charged, at the higher rates [**3] for cities not within the Allnet system. Plaintiffs allege that all the defendants conspired together to conceive, and then implemented, the overcharge system as a scheme to defraud class members.

Motion to Dismiss

The defendants have moved to dismiss all six counts of the complaint on various grounds. In considering a Rule 12(b)(6) motion to dismiss, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief requested. *Cruz v. Beto*, 405 U.S. 319, 323, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). The court must accept as true all material facts well pleaded in the complaint, and must make all reasonable inferences in the light most favorable to the plaintiff. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976). The court need not strain, however, to find inferences available to the plaintiff which are not apparent on the face of the complaint. *Coates v. Illinois State Board of Education*, 559 F.2d 445, 447 (7th Cir. 1977).

Counts I and II -- RICO

In their [**4] original motion to dismiss, filed before the 7th Circuit Court of Appeals issued its decision in *Haroco, Inc. v. American National Bank & Trust Company*, 747 F.2d 384 (7th Cir. 1984), defendants argued that plaintiffs' RICO counts were deficient for failure to allege a "RICO injury." The *Haroco* decision squarely rejected any requirement of alleging a "RICO injury," and defendants have since abandoned this argument.

Defendants also advance a number of other arguments for dismissal of the RICO counts. They assert that plaintiffs have failed to plead the fraud alleged against the individual defendants with sufficient particularity to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9 (b) provides that:

> In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

This requirement of greater specificity is intended to protect defendants from the harm that results from charges of serious wrongdoing, and to give the defendants [*405] notice of the conduct complained of. *D & G Enterprises v. Continental* [**5] *Illinois National Bank*, 574 F. Supp. 263, 266-67 (N.D. Ill. 1983); *Todd v. Oppenheimer & Co., Inc.*, 78 F.R.D. 415, 419 (S.D.N.Y. 1978), citing *Segan v. Dreyfus Corp.*, 513 F.2d 695, 696 (2nd Cir. 1975). As the court in *D & G Enterprises* noted, complaints alleging fraud should seek redress for a wrong, rather than attempt to discover unknown wrongs. 574 F. Supp. at 266, citing *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977), *affirmed*, 636 F.2d 1201 (2nd Cir. 1980).

However, Rule 9(b) must be read together with Rule 8, which requires a plain and concise statement of the claim. *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975). Therefore, although a plaintiff must allege with particularity the specific acts comprising the fraud, he need not plead detailed evidentiary matters. The allegations should describe the circumstances constituting the fraud, including the time, place and contents of the false representations, as well as the identity of the party making the misrepresentation. *D & G Enterprises*, 574 F. Supp. at 267.

Moreover, when there are allegations of a fraudulent scheme with multiple defendants, the complaint must [**6] inform each defendant of the specific fraudulent acts which constitute the basis of the action against each particular defendant. *Id.; Adair v. Hunt International Resources*, 526 F. Supp. 736, 744 (N.D.Ill. 1981); *Lincoln National Bank v. Lampe*, 414 F. Supp. 1270, 1279-79 (N.D. ILL. 1976).

In this case, plaintiffs have made specific allegations of the manner in which the alleged fraud or overcharges were carried out by Allnet as a corporation. As noted above, the complaint specifies the three ways in which Allnet allegedly overcharged its customers. Viewing these allegations in light of the standards under Rules 9(b) and 8 discussed above, the court finds that these allegations plead fraud with sufficient particularity with respect to Allnet. However, with respect to the individual defendants, the complaint fails to include any allegation as to how any individual defendant participated in the fraud. The complaint merely alleges that Allnet and the individual defendants schemed to defraud customers by overcharging them, and then describes the types of overcharges. Nowhere does the complaint specify any act by any particular defendant through which the fraud was carried out. [**7] The individual defendants are merely "lumped" together with Allnet and accused of performing the same fraudulent acts. Under Rule 9(b) and the cases discussed above, these allegations are clearly insufficient to support claims of fraud against the individual defendants.

Plaintiffs' response to their failure to plead any individual acts by individual defendants is that defendants have destroyed documents which would support their claim of fraud, and otherwise hindered detection of their wrongdoing. These unsupported allegations are insufficient to withstand scrutiny under Rule 9(b). As the court in *D & G Enterprises* noted, plaintiff should not make serious accusations of fraud until they have ascertained what wrongs have been committed; fraud should not be alleged in the hope of later discovering some. 574 F. Supp. at 266.

The Seventh Circuit has relaxed the requirement of pleading fraud with particularity in cases where matters are particularly within the knowledge of the opposing party. In these circumstances, allegations based "on information and belief" may be sufficient, but the allegations must be accompanied by a statement of facts upon which the belief is founded. *Duane* [**8] *v. Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962); *D & G Enterprises*, 574 F. Supp. at 267. Thus, even when particular facts are solely within the knowledge of the defendant, the plaintiff must still make sufficient particular allegations based "on information and belief," and submit a statement of the facts upon which the belief is based.

In this case, plaintiffs have failed to make any particular allegations of any individual defendant's conduct, even "on information [*406] and belief," and plaintiff has not, and apparently is unable to, proffer any statement of facts on which such allegations could be based. Plaintiffs have therefore failed to meet the standard of Rule 9(b) for pleading fraud against the individual defendants. Accordingly, plaintiffs' claims against the individual defendants in Counts I and II must be dismissed.

In Count I, plaintiffs allege that Allnet and all the individual defendants together defrauded plaintiffs in violation of §§ 1962(a), (b), (c) and (d). In Count II, plaintiffs alternatively allege that only the individual defendants, and not Allnet, defrauded plaintiffs in violation of § 1962 (a), (b), (c) and (d). Since the allegations against [**9] all the individual defendants are

fatally defective, Count II must be dismissed in its entirety. However, the analysis with respect to Count I is more complex.

Although the claims against the individual defendants in Count I must be dismissed, Allnet remains as a "person" alleged to have violated § 1962(a), (b), (c) and (d). The court must therefore address another argument raised by defendants: whether Allnet can be both the person who violates RICO and the enterprise through which the violation of RICO has been carried out.

The Seventh Circuit Court of Appeals has recently addressed this issue in *Haroco, Inc. v. American National Bank*, 747 F.2d 384 (7th Cir. 1984). In *Haroco*, the court considered both the statutory language and the legislative intent of section 1962(a) and (c). Section 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The court first noted that [**10] a corporation satisfies the definitions of both a "person" and an "enterprise" under section 1961. 747 F.2d at 400. The court then considered whether the act nevertheless requires that the person and the enterprise be separate entities. Focusing on the language of § 1962(c), the court observed that the provision requires that the liable person be "employed by or associated with any enterprise" which affects commerce. The court reasoned that the use of the terms "employed by" and "associated with" appears to contemplate that the person be distinct from the enterprise. The court therefore concluded that, for an action under § 1962(c), the "person" alleged to have violated the provision must be an entity separate and distinct from the "enterprise" through which commerce was affected. *Id.*

Employing the same analysis to § 1962(a), however, the court reached the opposite result. Section 1962(a) provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title [**11] 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

Once again, the court focused on the language of subsection (a), and determined that, in contrast to subsection (c), subsection (a) does not contain any language requiring that the "person" and the "enterprise" be distinct. It does not require that the person be employed by or associated with, the enterprise, or contain any other language implying that the two entities must be distinct. The court also emphasized that subsection (a) prohibits the use of income from racketeering in the "operation" of the enterprise, implying that the legislature must have envisioned a corporation using the proceeds of racketeering activity in its own operations. The court therefore concluded that, in actions under [*407] subsection (a), the person liable and the enterprise may be the same entity, *i.e.*, "the person liable may be a corporation using the proceeds of a pattern of racketeering [**12] activity in its

operations." *Id.* at 402.

The court found this interpretation of subsections (a) and (c) consistent with the idea that corporations should not be liable if they are merely victims of a fraud perpetrated by lower-level employees, but that a corporation should be held liable if it has itself been a perpetrator of the fraud. Thus, under subsection (a), a corporation can be held liable if it is a perpetrator, or the direct or indirect beneficiary of the pattern of racketeering, but under subsection (c), where the corporation is merely the "victim, prize, or passive instrument" of racketeering, the corporation cannot be liable. 747 F.2d at 402.

In this case, as noted above, plaintiffs have alleged in Count I violations of § 1962(a), (b), (c) and (d). Since Allnet is the only remaining entity in Count I, it must serve as both the person liable and the enterprise. Under *Haroco*, the claim under § 1962(c) must be dismissed for failure to allege an enterprise separate and distinct from the "person" liable. However, the claim under § 1962(a) cannot be dismissed on this basis, since, under *Haroco*, Allnet may serve as both the "person" and the "enterprise."

The [**13] *Haroco* court did not address whether the "person" and the "enterprise" must be distinct under § 1962(b). However, applying the same analysis, it appears that, as with subsection (c), the same entity may not serve as both "person" and "enterprise." Section 1962(b) provides:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Although this provision does not contain the language in subsection (c) requiring that the person be employed by or associated with the enterprise, it does require that the person "acquire or maintain" an "interest in or control of" any enterprise. Like the language in subsection (c), this language implies that the person acquiring an interest in or control of the enterprise must be separate from the enterprise itself. As with subsection (c), the language contemplates that the enterprise is the victim, not the perpetrator, of the crime. Separate entities must therefore fill the roles of the [**14] "person" and the "enterprise." And, unlike subsection (a), subsection (b) does not refer to the use of funds in the "operation" of the enterprise, making unlikely the inference that the legislature intended subsection (b) to cover a corporation using the proceeds of racketeering activities for its own operations. The court therefore concludes that, for a cause of action under § 1962(b), the person liable and the enterprise must be two distinct entities. In this case, since Allnet cannot serve as both "person" and "enterprise," plaintiffs' claim in Count I under § 1962(b) must also be dismissed.

The only remaining claim in Count I is under § 1962(d), which makes unlawful conspiracies to violate § 1962(a), (b) and (c). Since a conspiracy necessarily requires more than one person, and the allegations with respect to the individual defendants have been dismissed, plaintiffs' cause of action under § 1962(d) must also be dismissed.

Accordingly, the court dismisses all causes of action alleged in Count I, except for plaintiffs' cause of action under 18 U.S.C. § 1962(a) against Allnet only. Plaintiffs are granted leave to file an amended complaint within 21 days from the date of this [**15] order. If an amendment is filed, defendants are granted 21 days to answer or otherwise plead.

[*408] *Count III - Federal Communications Act*

In Count III, plaintiffs allege that defendants have violated section 203(c) of Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 203(c), by charging plaintiffs rates in excess of its rate schedules filed with the FCC. Section 203(c) provides:

> (c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provision of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices [**16] affecting such charges, except as specified in such schedule.

Defendants assert that plaintiffs' claims under the Communications Act must be dismissed and referred to the FCC under the doctrine of primary jurisdiction. This doctrine requires courts to defer to administrative agencies issues intended by Congress to be within an agency's expert discretion. The Supreme Court described this doctrine in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956), in which it stated:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. [**17] *General American Tank Car Corp. v. El Dorado Terminal*
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> *Co.*, 308 U.S. 422, 433, 60 S. Ct. 325, 331, 84 L. Ed. 361.

Courts have applied this doctrine to require deferral to administrative agencies of matters that call for the exercise of an agency's discretion and expertise. For example, a dispute as to whether a carrier's rates or practices are reasonable has uniformly been deemed to be within the primary jurisdiction of the appropriate regulating agency. As the court held in *Danna v. Air France*, 463 F.2d 407, 409 (2nd Cir. 1972):

> It is beyond dispute that claims that filed tariffs are either unreasonable in amount or unduly discriminatory in effect are questions that in the first instance must be determined by the agency with the tariffs are filed. Any attempt to sue in federal court or in state court on such claims without first obtaining an agency determination of unreasonableness or undue discrimination fails to state a cause of action.

See also Montana-Dakota Utility Co. v. Northwestern Public Service Co., 341 U.S. 246, 251, 71 S. Ct. 692, 695, 95 L. Ed. 912 (1951); *Detroit, Toledo and Irontown Railroad Co. v.*

Consolidated Rail Corp., 727 F.2d [**18] 1391, 1394-95 (6th Cir. 1984); *Booth v. American Telephone and Telegraph Co.*, 253 F.2d 57 (7th Cir. 1958).

However, when a party before a court challenges not the reasonableness of a tariff but only whether the carrier has failed to abide by the tariff, no issues requiring agency discretion or expertise are raised. As the court in *Danna v. Air France, [*409] supra*, noted, quoting from *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 131-32, 35 S. Ct. 484, 488, 59 L. Ed. 867 (1915):

> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts.

463 F.2d at 410.

The court in *Detroit, Toledo, supra*, recently succinctly summarized the law on this matter, stating:

> The rule which emerges from an examination [**19] of representative decisions is that federal courts should decide issues relating to purely commercial transactions between regulated carriers and should perform their judicial function of interpreting and enforcing contracts between such parties except when such judicial action results in interference with the functions congress has placed in the hands of the commission.

727 F.2d at 1396.

In this case, plaintiffs allege only that Allnet filed tariffs with the FCC, and then charged plaintiffs rates in excess of those stated in the tariffs. Thus, plaintiffs challenge only whether the tariff has been violated by Allnet, not whether the rates set were reasonable. The court is not called upon to set or in any way alter a tariff filed with the FCC. A decision in the merits in this case therefore requires no exercise of an administrative discretion, nor would it affect the overall regulatory scheme. The court need only decide whether the tariffs were in fact violated, a matter clearly within the province of the federal courts. The doctrine of primary jurisdiction is therefore inapplicable to this case. Accordingly, defendants' motion to dismiss Count III is denied.

Counts IV, [**20] *V and VI - State Law Claims*

The remaining counts, Count IV, V and VI, allege common law fraud (Count IV), violations of the Uniform Deceptive Trade Practices Act, Ill. Rev. Stat. ch. 121 1/2, § 311 *et seq.* (Count V), and violations of the Illinois Consumer Fraud & Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2 § 261 *et seq.* (Count VI). Defendants have moved to dismiss all three state law claims on the basis that they are preempted by the FCC Act.

Defendants rely primarily on *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2nd Cir. 1968). In *Ivy*, the court addressed whether, in the absence of diversity jurisdiction, a federal court has jurisdiction over a claim for negligence and breach of contract in connection with telephone services provided by carrier regulated by the

Communications Act. Although the court found that the remedy sought by plaintiffs was not available under the Act, it held that federal jurisdiction could be based on federal common law emanating from the act. The court observed that the broad statutory scheme embodied in the Act indicates a Congressional intent to occupy the field to the exclusion of [**21] state law. 391 F.2d at 490. The Court then concluded that:

> Questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communication service are to be governed solely by federal law and . . . states are precluded from acting in this area. Where neither the Communications Act nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law.

391 F.2d at 491.

Relying on this language, defendants assert that all state law claims relating to [*410] matters governed by the Communications Act are preempted by the Act. Defendants ignore, and the *Ivy* court did not address, however, the "savings clause" embodied in section 414 of the Act, 47 U.S.C. § 414, which provides:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

The Supreme Court interpreted an identical "savings clause" in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1975), in which [**22] the Court upheld the plaintiff's common law claim for fraudulent misrepresentation against an air carrier subject to regulation by the Civil Aeronautics Board under the Federal Aviation Act of 1958, 49 U.S.C. § 1381. Quoting from *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907), the court noted that a common law right is not abrogated, even without a savings clause, "unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." 426 U.S. at 299, 96 S. Ct. at 1984. The Court in *Nader* concluded that the common law remedy was not preempted because "the common law action and the statute are not 'absolutely inconsistent' and may coexist." 426 U.S. at 300, 96 S. Ct. at 1985.

More recently, however, in *City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), the Supreme Court took a more restrictive view of the preemption question, holding that the previously created federal common law action for nuisance was preempted by amendments to the [**23] Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq*. The savings clause in the Water Pollution Act provided that "nothing *in this section*" (emphasis added) precluded other common law and statutory remedies. Siezing upon this limiting language, the Court held that, although nothing in that particular section of the act, the citizen-suit provisions, 33 U.S.C. § 1365, precluded common law remedies, the pervasive regulatory scheme of the act as a whole did preclude other remedies. 451 U.S. at 327-29, 101 S. Ct. at 1797-98. The Court may therefore be retrenching somewhat from its expansive view in *Nader* of savings clauses and common law remedies in highly regulated fields. n1

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n1 It should be noted that the alternate remedies sought in *City of Milwaukee* were under

federal common law, not state common law, and the court discussed the vague and indeterminate nature of federal common law remedies, in contrast with the comprehensive regulatory program supervised by an expert administrative agency established under the 1972 Amendments to the Federal Water Pollution Control Act. The decision may therefore be distinguished from the instant case on this basis, and more importantly, because the savings clause in the instant case is not limited to preserving causes of action in a particular section of the Act, but instead expressly applies to the entire Act.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**24]

Few courts have specifically addressed the question of preemption with respect to the Communications Act. One court, in *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701 (1st Cir. 1977), interpreted § 414 in a manner consistent with the Supreme Court decisions discussed above. In *Comtronics*, the court held that the plaintiff had no cause of action under the Communication Act because "connecting carriers" such as the defendant in that case were explicitly exempted from its coverage. The court also dismissed the plaintiff's constitutional claims, stating that the "precisely drawn, detailed statute preempts more general remedies." 553 F.2d at 707, quoting *Brown v. G.S.A.*, 425 U.S. 820, 834, 96 S. Ct. 1961, 1968, 48 L. Ed. 2d 402 (1976). In reaching this result, the court interpreted § 414 as follows:

> Because we hold that Congress withheld a damages remedy under the Act against connecting carriers . . ., we think it would make little sense to hold that a damages remedy exists against them under [*411] § 1983 for violations of the very same Act. The "existing" remedies Congress had in mind under § 414 would scarcely be remedies so closely dependent [**25] upon the Act itself; rather we read § 414 as preserving causes of action for breaches of duty distinguishable from those created under the Act, as in the case of a contract claim. . . .

553 F.2d at 707-08, n.6 (citations omitted). This ruling is consistent with *Nader*, because the court recognized causes of action outside the act only when they do not conflict with express provisions of the act. The decision in *City of Milwaukee* does not impact on this interpretation of § 414, because § 414 applies specifically to the entire Communications Act, not only to a particular provision of the Act.

The same conclusion was recently reached by the court in *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984). In *Kaplan*, the plaintiff alleged that the defendant charged customers for unanswered long distance calls without disclosing this fact to the customers. Plaintiffs sued under § 201(b) of the Communications Act, 47 U.S.C. § 201 (b), as well as under the New York Deceptive Acts and Practices, General Business Law § 349 (McKinney's), and for fraud, misrepresentation, and breach of agreements embodied in defendant's advertisements.

In [**26] a well-reasoned decision, the court applied the test set forth in *Comtronics, supra*, and concluded that the common law claims asserted by plaintiffs are not preempted by the Communications Act. The court reasoned that the breaches of duty alleged under the common law claims are markedly different from the statutory claims. 589 F. Supp. at 735. For example, to prove fraud and misrepresentation, the plaintiff must establish a breach of a duty to disclose information, as well as scienter, reliance, and damages. *Id.* at 736. The court concluded that, since the common law causes of action challenge conduct that is not contemplated by the Communications Act, under *Comtronics*, § 414 serves to preserve the common law actions alleged by plaintiff in this case. n2

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n2 *See also Ashley v. Southwestern Bell Telephone Co.*, 410 F. Supp. 1389, 1392-93 (W.D. Tex. 1976) (action for invasion of privacy not preempted by Communications Act); *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1120-21 (3rd Cir. 1979), and *Sound, Inc. v. American Telephone & Telegraph Co.*, 631 F.2d 1324, 1329 (8th Cir. 1980) (Communications Act held not to preempt actions under antitrust laws).

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This court finds the reasoning in *Comtronics* and *Kaplan* persuasive, and reflective of current legal analysis of the preemption issue. Under these decisions, § 414 must be applied to preserve the common law actions alleged by plaintiffs in this case. As in *Kaplan*, the plaintiffs here allege common law fraud, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act. The duty owed by defendants under each of these causes of action is distinct from the duties created by the Communications Act; each is intended to prohibit different types of wrongs distinct from those prohibited by the Communications Act. None of these causes of action conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies to preserve these causes of action.

Accordingly, defendants' motion to dismiss Count IV, V and VI is denied.

*112 Ill. 2d 428, *; 493 N.E.2d 1045, **;*
*1986 Ill. LEXIS 265, ***; 98 Ill. Dec. 24*

S. KELLERMAN, et al., Appellees, v. MCI TELECOMMUNICATIONS CORPORATION, Appellant. - - PHYLLIS HESSE, Appellee, v. MCI TELECOMMUNICATIONS CORPORATION, Appellant

No. 62132

Supreme Court of Illinois

112 Ill. 2d 428; 493 N.E.2d 1045; 1986 Ill. LEXIS 265; 98 Ill. Dec. 24

May 21, 1986, Filed

PRIOR HISTORY: [***1]

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Albert Green, Judge, presiding.

DISPOSITION: Judgment affirmed.

CORE TERMS: preempted, Communications Act, interstate, telephone, carrier, telephone service, customers, federal law, regulation, long-distance, state law, breach of contract, advertisements, deceptive, primary jurisdiction, interlocutory appeal, failure to disclose, et seq, state regulation, preemption issue, consolidated, uniformity, expertise, referral, preempt, airline, duties, occupy, rapid, consumer fraud

COUNSEL: Chester T. Kamin, Richard J. Gray, Darryl M. Bradford, Patricia Lee Refo, and Robert S. Markin (Jenner & Block of Chicago, of counsel), for appellant.

Russell C. Green and Alvin W. Block, of Block, Levy & Associates, of Chicago, for appellee S. Kellerman *et al.*

Kevin M. Forde, Ltd., of Chicago (Kevin M. Forde, of counsel), and Howard Z. Gopman & Associates, of Skokie (Howard Z. Gopman and Katrina Veerhusen, of counsel), for appellee Phyllis Hesse.

JUDGES: JUSTICE MORAN delivered the opinion of the court. JUSTICE SIMON took no part in the consideration or decision of this case.

OPINIONBY: MORAN

OPINION: [*434] [**1047] Plaintiffs, subscribers of defendant MCI's long-distance telephone service, brought these class action suits in the circuit court of Cook County alleging that certain advertisements, which described defendant's service charges, violate the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 261 *et seq.*) and [***2] the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 311 *et seq.*). Plaintiffs also allege that defendant's advertising practices constitute a breach of contract and common law fraud. They seek damages and an accounting for themselves and other persons similarly situated.

After the cases were consolidated by the trial court, defendant moved to dismiss the actions, contending that the State-law claims are preempted by the Federal Communications Act of 1934 (Communications Act) (47 U.S.C. sec. 151 *et seq.* (1982)). Alternatively it requested

that the court stay the actions and refer plaintiffs' claims to the Federal Communications Commission (FCC) based on the doctrine of primary jurisdiction, or stay the actions pursuant to section 2 -- 619(a)(3) of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3)). The trial court denied defendant's motion to dismiss or stay the actions. It also refused defendant's request to certify the preemption issue for interlocutory appeal. (See 87 Ill. 2d R. 308.) Thereafter, defendant appealed the denial of the stay. (87 Ill. 2d R. 307.) The appellate court, in addition to affirming [***3] the denial of the stay, determined that it had jurisdiction to consider the preemption issue even though the trial [*435] court had not certified the issue for interlocutory review. The appellate court held that plaintiffs' State-law claims are not preempted by the Communications Act. (134 Ill. App. 3d 71.) We allowed defendant's petition for leave to appeal (94 Ill. 2d R. 315).

Defendant's principal contention is that plaintiffs' claims are preempted by the Communications Act (47 U.S.C. sec. 151 *et seq.* (1982)). Defendant asserts that the "comprehensive nature" of the Communications Act demonstrates that Congress "intended to occupy the entire field of interstate long distance telephone service." It argues that the conduct challenged by plaintiffs is "at the center of the occupied field" and that, therefore, plaintiffs' State-law claims are preempted. Plaintiffs contend, however, that their actions are not preempted, asserting that the only conduct [**1048] being challenged is defendant's advertising practices and not the manner in which it provides interstate telephone service. Defendant raises two alternative arguments as to why this court should either [***4] dismiss or stay these actions. First, it contends that under the doctrine of primary jurisdiction the actions should be stayed and plaintiffs' claims referred to the FCC. Additionally, defendant requests that the suits be stayed pursuant to section 2 -- 619(a)(3) of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3)), asserting that there is a Federal action pending which involves the same parties and same cause.

The record shows that plaintiffs originally brought four separate actions against defendant in the circuit court. Three of the actions, filed by plaintiffs S. Kellerman, Bernard Turovitz and Louis T. Davis & Associates, Inc. (Davis), were consolidated by the trial court for all purposes. The action brought by Phyllis Hesse was consolidated with the other actions for pretrial purposes only. The allegations contained in all four complaints are substantially similar in that they attack certain of [*436] defendant's advertisements and promotional material as fraudulent and deceptive.

The advertisements and promotional material in question compare the cost of defendant's long-distance telephone service with the cost of a service provided [***5] by a competitor, American Telephone & Telegraph Company (AT&T). Plaintiffs allege that in order to induce them to purchase its service, defendant disseminated certain advertisements and promotional materials through various media which claimed that "although its rates are substantially lower" than AT&T's, "its billing practices and procedures were identical to those of" AT&T. They allege that AT&T charges its customers only for completed calls and no charge is made to customers for calls which are initiated but not completed, *i.e.*, where the recipient does not answer or the caller terminates the call before it is answered. In contrast, plaintiffs allege that defendant has billed its customers for uncompleted calls.

Plaintiffs further allege that it was defendant's practice to impose a surcharge in situations where the telephone rang six or more times before it was answered -- a charge not customarily imposed in the industry. It also is alleged that every time customers used defendant's service they paid a local telephone charge which AT&T customers did not have to pay. Plaintiffs do not challenge the reasonableness of the additional charges imposed by defendant, but only [***6] the fact that its advertising did not disclose that the additional charges would be made. It is alleged that through these advertisements and promotions, defendant "engaged in a course of conduct to falsely represent to the plaintiff[s] and the general public that its practice and policy [were] * * * to bill its customers only for the actual time of communication during completed long distance calls" when in fact its practice was to bill its customers for uncompleted calls and to impose a surcharge when a telephone rang six

or more [*437] times before it was answered. Plaintiffs allege that defendant's conduct constitutes common law fraud, a breach of contract, and that it violates the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 311 *et seq.*) and the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 261 *et seq.*).

Before proceeding with the issues raised by defendant, we find it necessary to determine whether the preemption issue is properly before this court. Plaintiffs Kellerman, Turovitz and Davis contend that since the trial court refused to certify the preemption question for interlocutory [***7] appeal in accordance with Supreme Court Rule 308 (87 Ill. 2d R. 308), the appellate court did not have jurisdiction to consider it. As such, they assert that the issue is not properly before this court.

The appellate court, relying on this court's decision in *May Department Stores Co. v. Teamsters Union Local No. 743* (1976), 64 Ill. 2d 153, held that it had jurisdiction to consider whether [**1049] plaintiffs' actions are preempted by the Communications Act. In *May*, store owners sought to enjoin a union from soliciting store employees and distributing union literature in the store's parking lot, claiming that the union's activities violated State criminal trespass laws. The union contended that Federal law preempted the authority of the State courts to issue an injunction barring its organizational activities on store property. The trial court granted the preliminary injunction, and the union perfected an interlocutory appeal pursuant to Rule 307. On appeal from the appellate court, this court viewed the union's preemption argument as a challenge to the State courts' authority to issue the preliminary injunction and, therefore, a proper subject on interlocutory [***8] appeal.

After reviewing the record in the present case in light of *May*, we believe that the appellate court was [*438] correct in finding that it had jurisdiction to address the preemption issue. Defendant's Federal preemption argument brings into issue the authority of the trial court to enter the order appealed from and, thus, the argument is properly considered on interlocutory appeal. Therefore, we will consider defendant's argument that plaintiffs' State-law actions are preempted by the Communications Act.

The preemption doctrine, which has its origin in the supremacy clause of the Federal Constitution (U.S. Const., art. VI, cl. 2), provides that Federal law will in some instances override or preempt State laws on the same subject. (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 229-31, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1151-53.) The key inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. The doctrine requires courts to examine the Federal statute in question to determine whether Congress intended it to supplant State laws on the same subject. (*Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. [***9] 202, 208, 85 L. Ed. 2d 206, 213, 105 S. Ct. 1904, 1910.) Generally this is no easy task because rarely does Congress, in enacting legislation, expressly provide that concurrent State laws will be preempted. Rather, a court must usually divine for itself whether the statute evidences an intent by Congress to preempt State law.

Although there is no "rigid formula or rule which can be used" to determine if Congress intended Federal law to preempt plaintiffs' actions for fraud, deceptive advertising and breach of contract (*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404), our "consideration of that question is guided by familiar and well-established principles" (*Capital Cities Cable, Inc. v. Crisp* (1984), 467 U.S. 691, 698, 81 L. Ed. 2d 580, 588, 104 S. Ct. 2694, 2700), which the Supreme Court has enumerated as follows:

> [*439] "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch

> [***10] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.' [Citation.]
>
> Even where Congress has not completely displaced state regulation in a specific area, State law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation] or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' * * *." *Fidelity Federal Savings & Loan Association v. De la Cuesta* (1982), 458 U.S. 141, 153, 73 L. Ed. 2d 664, 675, 102 S. Ct. 3014, 3022.

The express purpose of the Communications Act (47 U.S.C. sec. 151 *et seq.* (1982)) is to "make available, so far as possible, to [**1050] all the people of the United States a rapid, efficient * * * communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) To that end, [***11] the Act applies "to all interstate and foreign communication by wire or radio * * * and to all persons engaged within the United States in such communication" (47 U.S.C. sec. 152(a) (1982)), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with [its] communication service, shall be just and reasonable." (47 U.S.C. sec. 201(b) (1982).) Under section 206, any carrier which violates a provision of the Act is liable "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." (47 U.S.C. sec. 206 (1982).) An injured [*440] party may file a complaint against the carrier with the FCC (47 U.S.C. sec. 207 (1982)), which has the power "to investigate the matters complained of" (47 U.S.C. sec. 208 (1982)), and to award damages when appropriate (47 U.S.C. sec. 209 (1982).) Alternatively, an aggrieved party can file an action against the carrier in Federal district court. 47 U.S.C. sec. 207 (1982).

Defendant essentially makes two arguments as to why plaintiffs' actions are preempted by the Communications Act. First, it argues that the "comprehensive [***12] nature" of the Act, as briefly outlined above, demonstrates that Congress "intended to occupy the entire field of long distance telephone service" to the exclusion of State law. It asserts that the conduct challenged here falls within the broad field of interstate long-distance telephone service, and, hence, is preempted. Defendant's second argument is much narrower. While conceding for purposes of argument that the Act may not preempt all State regulation of long-distance telephone carriers, it contends that the Act specifically governs a carrier's "charges, practices and tariffs." Defendant maintains that plaintiffs, although "artfully emphasizing advertising and state law theories of liability," in reality are challenging "FCC-regulated charges, practices and tariffs." It argues that since plaintiffs are attacking "charges, practices and tariffs" regulated by Federal law, the State-law actions are preempted by the Act.

While we agree with defendant that the Communications Act represents a "broad scheme for the regulation of interstate service by communications carriers" (*Ivy Broadcasting Co. v. American Telephone & Telegraph Co.* (2d Cir. 1968), 391 F.2d 486, 490), we cannot [***13] agree that Congress intended to supplant all State regulation of interstate telephone carriers, no matter how unrelated the State regulation is from Congress' objective of creating an interstate telephone network that is rapid, efficient [*441] and reasonably priced. The Act contains a saving clause which provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C. sec. 414 (1982).) Thus, to argue, as defendant has, that Congress has "occupied the field of interstate long distance telephone service" does not answer the question of whether these particular State-law actions are preempted by the Act. Rather, as the appellate court in this case keenly observed, the relevant inquiry is what are the "precise contours" of the field that

Congress has chosen to occupy. 134 Ill. App. 3d 71, 74.

Little guidance can be gleaned from the Communications Act itself, and few cases have discussed Federal preemption with respect to the Act. In *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.* (2d Cir. 1968), 391 F.2d [***14] 486, the court concluded that an action against two telephone companies for the negligent "installation and testing" of telephone lines was governed exclusively by Federal common law. The court, reasoning that the "congressional purpose of uniformity and equality of rates should be taken to imply uniformity and equality of service," stated that "questions concerning the duties, charges and liabilities of telegraph or telephone companies [**1051] with respect to interstate communications service are to be governed solely by federal law." (391 F.2d 486, 491.) The *Ivy* court, however, did not discuss the scope of the saving clause of the Act, section 414 (47 U.S.C. sec. 414 (1982)). Subsequent cases have viewed section 414 as "preserving causes of action for breaches of duties distinguishable from those created under the Act." *Comtronics, Inc. v. Puerto Rico Telephone Co.* (1st Cir. 1977), 553 F.2d 701, 707-08 n.6.

In *Ashley v. Southwestern Bell Telephone Co.* (W.D. Tex. 1976), 410 F. Supp. 1389, the court, relying on section [*442] 414 of the Act, held that a State-law action brought against an FCC-regulated carrier for invasion of privacy was not preempted [***15] by the Act. Similarly, in *Bruss Co. v. Allnet Communication Services, Inc.* (N.D. Ill. 1985), 606 F. Supp. 401, a case closely analogous to the case at bar, the court held that State-law claims alleging common law fraud and violations of Illinois' deceptive trade and consumer fraud acts were not preempted by the Act. In that case, it was alleged that the defendants had charged plaintiffs and other long-distance customers rates in excess of the tariffs filed with the FCC. The court, reasoning that the State claims "challenge[d] conduct that is not contemplated by the Communications Act," held that the actions were preserved under section 414. 606 F. Supp. 401, 411.

In interpreting a statutory provision, courts "'will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute * * * and the objects and policy of the law.'" (*Stafford v. Briggs* (1980), 444 U.S. 527, 535, 63 L. Ed. 2d 1, 9, 100 S. Ct. 774, 780.) Therefore, it is implausible to think that section 414 of the Act preserved all State-law remedies affecting interstate telephone carriers no matter how repugnant those State laws are to the purposes [***16] and objectives of Congress. It is reasonable to presume that State laws which interfere with Congress' objective of creating "a rapid, efficient, Nation-wide, * * * communication service with adequate facilities at reasonable charges" (47 U.S.C. sec. 151 (1982)), such as State attempts to regulate interstate carriers' charges or services, would be preempted by the Act. (See, *e.g., Komatz Construction, Inc. v. Western Union Telegraph Co.* (1971), 290 Minn. 129, 186 N.W.2d 691 (action against telegraph company for damages caused by delay in transmission of telegram is governed by Federal law).) However, we believe that section 414, when considered [*443] in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act." (*Comtronics, Inc. v. Puerto Rico Telephone Co.* (1st Cir. 1977), 553 F.2d 701, 708.) State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Defendant argues that plaintiffs, while [***17] "artfully" pleading fraud and deceptive-advertising claims, in reality "seek recovery for federally regulated charges." As such, it asserts that plaintiffs' actions are preempted by the Act. Although a similar argument has prevailed in at least one Federal district court (see *In re Long Distance Telecommunications Litigation* (E.D. Mich. 1984), 598 F. Supp. 951), we think the better view is that plaintiffs' actions are not preempted by the Act. (See *Bruss Co. v. Allnet Communication Services, Inc.* (N.D. Ill. 1985), 606 F. Supp. 401.) The subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements

concerning the cost of its long-distance telephone service. As such, plaintiffs seek to hold defendant to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies. Moreover, these actions do not [**1052] present "an obstacle to the accomplishment" [***18] of the Federal policy of promoting a "rapid, efficient * * * communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers, and any possible [*444] effect the litigation could have on defendant's telephone rates is speculative at best. Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted.

Alternatively, defendant argues that the doctrine of primary jurisdiction requires these actions to be stayed pending review of the claims by the FCC.

The doctrine of primary jurisdiction is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." (*United States v. Western Pacific R.R. Co.* (1956), 352 U.S. 59, 63, 1 L. [***19] Ed. 2d 126, 132, 77 S. Ct. 161, 165.) The doctrine provides that even when a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of the controversy, or a portion of it, to an administrative agency having expertise in the area. (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 303-04, 48 L. Ed. 2d 643, 654-55, 96 S. Ct. 1978, 1986-87.) The Supreme Court, in *Far East Conference v. United States* (1952), 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492, described the doctrine as follows:

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally [*445] exercised, by preliminary resort for ascertaining [***20] and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (342 U.S. 570, 574-75, 96 L. Ed. 576, 582, 72 S. Ct. 492, 494.)

Thus, under the doctrine a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards. (*United States v. Western Pacific R.R. Co.* (1956), 352 U.S. 59, 64, 1 L. Ed. 2d 126, 132, 77 S. Ct. 161, 165.) Conversely, when an agency's technical expertise is not likely to be helpful, or there is no need for uniform administrative standards, courts should not relinquish their authority over a matter to the agency. *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 304, 48 L. Ed. 2d 643, 655, 96 S. Ct. 1978, 1987.

In *Nader*, the plaintiff was "bumped" from a flight because the defendant airline, as was the industry custom, had overbooked the flight. Civil Aeronautics Board (CAB) regulations required airlines to offer "denied boarding compensation" to bumped passengers. [***21] Instead of accepting the offered compensation, however, the plaintiff brought a common law

action in Federal district court, alleging that the airline's failure to inform him in advance of its overbooking practices constituted a fraudulent misrepresentation. The district court found for the plaintiff, but the court of appeals reversed, holding that the doctrine of primary jurisdiction required referral of the matter to the CAB so that the agency could determine whether the airline's failure to disclose the overbooking practice was "deceptive" within the meaning of section [**1053] 411 of the Federal Aviation Act of 1958 (49 U.S.C. sec. 1381 (1970).) The Supreme Court in *Nader* reversed, concluding that "considerations of uniformity [*446] in regulation and of technical expertise do not call for prior reference to the Board." (426 U.S. 290, 304, 48 L. Ed. 2d 643, 655, 96 S. Ct. 1978, 1987.) The court explained that the plaintiff's common law action for fraudulent misrepresentation did not challenge the propriety or reasonableness of the overbooking practice, and thus, an "informed evaluation of the economics or technology of the regulated industry" was not likely [***22] to be helpful in resolving the case. (426 U.S. 290, 305-06, 48 L. Ed. 2d 643, 656, 96 S. Ct. 1978, 1987.) Moreover, the court observed that the "standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts." 426 U.S. 290, 305, 48 L. Ed. 643, 656, 96 S. Ct. 1978, 1987.

Our review of the above authorities, particularly the *Nader* case, convinces us that referral of these actions to the FCC is not required by the primary-jurisdiction doctrine. Like the plaintiff in *Nader*, the plaintiffs here do not contest the reasonableness or lawfulness of defendant's charges or billing practices, but only seek recovery for defendant's failure to disclose certain facts. In resolving the dispute it will not be necessary to evaluate "the economics or technology of the regulated industry" (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305, 48 L. Ed. 2d 643, 96 S. Ct. 1978, 1987), and, thus, we see little benefit, if any, in referring plaintiffs' claims to the FCC. Plaintiffs allege common law claims and violations of State statutes. The legal and factual issues that are involved in these cases are standard fare for [***23] judges, and, consequently, must be deemed to be "within the conventional competence of the courts." (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305-06, 48 L. Ed. 2d 643, 656, 96 S. Ct. 1978, 1987.) Therefore, we reject defendant's argument that the primary-jurisdiction doctrine requires that these actions be stayed pending referral to the FCC.

[*447] Defendant's final contention is that the trial court should have stayed these actions pursuant to section 2 -- 619(a)(3) of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3).) Section 2 -- 619(a)(3) allows a defendant to move for a dismissal or stay whenever "there is another action pending between the same parties for the same cause." (Ill. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3).) Defendant claims that a class action suit that is pending in the United States District Court for the Eastern District of Michigan involves the "same cause" and "same parties".

Section 2 -- 619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose. (*People ex rel. Department of Public Aid v. Santos* (1982), 92 Ill. 2d 120, 127; *People ex rel. Phillips* [***24] *Petroleum Co. v. Gitchoff* (1976), 65 Ill. 2d 249, 255.) Nevertheless, even when the "same cause" and "same parties" requirements are met, section 2 -- 619(a)(3) does not mandate automatic dismissal. Rather, the decision to grant or deny defendant's section 2 -- 619(a)(3) motion is discretionary with the trial court. (*People ex rel. Department of Public Aid v. Santos* (1982), 92 Ill. 2d 120, 125.) "The more reasonable construction [of section 2 -- 619(a)(3)] is that the circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed." *A. E. Staley Manufacturing Co. v. Swift & Co.* (1980), 84 Ill. 2d 245, 252-53.

The factors that a court should consider in deciding whether a stay under section 2 -- 619(a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect [*448] of a foreign judgment in the [***25] local forum. (*People [**1054] ex rel.*

Department of Public Aid v. Santos (1982), 92 Ill. 2d 120, 130; *A. E. Staley Manufacturing Co. v. Swift & Co.* (1980), 84 Ill. 2d 245, 254.) Our review of the record in this case shows that the trial judge properly considered the above factors in deciding that a stay was inappropriate, and we find no abuse of discretion.

We note that following the trial court's refusal of defendant's section 2 -- 619(a)(3) motion, the plaintiffs in the Federal case pending in Michigan filed a consolidated complaint. The Federal district court subsequently dismissed the Federal common law claims and referred the remaining claims, based on the Communications Act, to the FCC. (*In re Long Distance Telecommunication Litigation* (E.D. Mich. 1985), 612 F. Supp. 892.) This subsequent action in the Federal court is of no consequence, because all of the reasons that the trial court originally found persuasive in denying the stay are just as applicable, if not more so, now. None of the counts remaining in the Federal action allege common law claims for fraud or breach of contract, or claims based on Illinois' deceptive trade and consumer fraud [***26] statutes, but relate only to whether defendant's failure to disclose its charges constitutes a violation of section 201(b) (47 U.S.C. sec. 201(b)) of the Communications Act. The issue of whether defendant's failure to disclose certain charges is "unjust or unreasonable" under section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes. While some of the same documentary evidence may be used in both cases, the lawsuits involve entirely different theories and litigation strategies. Thus, considerations of comity, multiplicity and *res judicata* do not persuade us that these actions should be stayed. Moreover, as the trial judge observed, these actions were among the first [*449] to be filed in the country, and, consequently, it cannot be argued that the actions were filed with a vexatious purpose or with the intent to harass defendant. Thus, we find that the refusal to grant a stay pursuant to section 2 -- 619(a)(3) was not an abuse of discretion.

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed [***27] .

*867 F. Supp. 1511, *; 1994 U.S. Dist. LEXIS 17026, ***

COOPERATIVE COMMUNICATIONS, INC., a Utah corporation, Plaintiff, vs. AT&T CORP., a New York corporation, Defendant.

Civil No. 9-C-431G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

867 F. Supp. 1511; 1994 U.S. Dist. LEXIS 17026; 77 Rad. Reg. 2d (P & F) 404

November 15, 1994, Decided
November 15, 1994, FILED

CORE TERMS: Communications Act, state law, preempted, telecommunications, customer, federal common law, causes of action, savings clause, filed tariff, tariff, interstate, telephone, Federal Communications Act, carrier, misrepresentation, common law, aggregator, breach of contract, federal law, disparagement, regulated, interfere, provider, duties, preemption, intentional interference, unfair competition, motion to dismiss, regulatory scheme, distinguishable

COUNSEL: [**1] For COOPERATIVE COMMUNICATIONS, INC., Plaintiff: Thomas R. Karrenberg, John P. Mullen of Anderson & Karrenberg.

For AT&T, Defendant: Richard M. Hymas of Nielsen & Senior.

JUDGES: J. THOMAS GREENE, UNITED STATES DISTRICT JUDGE

OPINIONBY: J. THOMAS GREENE

OPINION: [*1513] MEMORANDUM DECISION AND ORDER

This matter came before the Court on Defendant AT&T Corporation's ("AT&T") Motions to Dismiss and to Strike. Plaintiff Cooperative Communications, Inc. ("CCI"), was represented by Thomas R. Karrenberg and John P. Mullen of Anderson & Karrenberg. AT&T was represented by Richard M. Hymas of Nielsen & Senior. The parties filed extensive memoranda and supporting materials, after which the Court heard oral argument and took the matter under advisement. Having considered the oral argument, motions, and memoranda on file, and now being fully advised, the Court renders its Memorandum Decision and Order.

FACTUAL BACKGROUND

In 1988, AT&T obtained approval from the Federal Communications Commission ("FCC") for a series of volume-based tariffs which allowed AT&T to sell long distance [*1514] communications services that could be purchased in large quantities at a discounted rate. Thereafter, companies known as "aggregator" companies began [**2] to contract with AT&T to purchase large amounts of AT&T long distance services at the discounted rates. The aggregators would then contract with persons or entities using smaller amounts of long distance service. The aggregator companies would aggregate the smaller customers, increasing their joint purchasing capacity, enabling the customers to purchase, through the aggregators, AT&T long distance services at a lower price than the persons or entities could have obtained from AT&T directly.

In 1989, Edwin B. HerrNeckar and Anne Smith HerrNeckar incorporated CCI under Utah law as an aggregator telecommunications company. CCI alleges that shortly after CCI commenced operation, the local office of AT&T attempted to drive CCI out of business. CCI

claims that AT&T, through the Salt Lake City branch office, engaged in wrongful acts as part of a systematic campaign aimed at discrediting CCI and interfering with CCI's customers. CCI alleges, inter alia, that AT&T made intentional misrepresentations to CCI's clients regarding CCI's ability to provide the services it promised, that AT&T misappropriated confidential client billing information, and that AT&T used that information in attempting [**3] to destroy CCI's customer base.

Specifically, CCI's complaint lists seven causes of action. They are: (1) intentional interference with prospective economic relations; (2) interference with contract; (3) business disparagement; (4) breach of the covenant of good faith and fair dealing; (5) unfair competition; (6) violation of the Utah Uniform Trade Secrets Act, Utah Code Ann. §§ 13-24-1 to -9 (1992); and (7) violation of the Federal Communications Act, 47 U.S.C. §§ 151-613 (1991 & Supp. 1994) ("Communications Act" or "Act").

AT&T responded by moving to dismiss CCI's state law claims on preemption grounds, and to dismiss CCI's federal claim, as well as any state law claims not preempted, as barred by the filed tariff doctrine. AT&T also moved to strike from the complaint all allegations regarding alleged wrongful acts occurring more than two years before the suit was filed as being time barred, in light of the two-year statute of limitations in the Communications Act.

Standard of Review

In determining whether to grant a motion to dismiss, this Court looks solely to the material allegations of the complaint, and must accept all material allegations [**4] of the complaint as true. Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). Additionally, all inferences that can be drawn from the allegations must be drawn in favor of the plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). A motion to dismiss will not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

I. APPLICATION OF THE FEDERAL COMMUNICATIONS ACT IN PREEMPTION OF STATE LAW CLAIMS

AT&T first moves this Court to dismiss CCI's six state statutory and common law claims as being preempted by the Federal Communications Act, 47 U.S.C. 151 §§ 151-613 (1991 & Supp. 1994).

A. The Preemption Doctrine

The preemption doctrine originates from the Supremacy Clause in the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law [**5] of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2. Under the Supremacy Clause, state laws which "'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution,' are invalid." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604, 115 L. Ed. 2d 532, 111 S. Ct. 2476 (1991) (quoting Gibbons v. Ogden, 22 U.S. 1, 211, 6 L. Ed. 23 (1824)).

[*1515] The primary inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985); Cipollone v. Liggett Group, Inc., 120 L. Ed. 2d 407, 112 S. Ct. 2608, 2617 (1992). Congressional intent may be expressly stated in the language of the statute, or may be implied by the structure and purpose of the statute. See Cippolone, 112 S. Ct. at 2617. Absent an express congressional statement, state law [**6] may be preempted in two situations: first, if the state law actually conflicts with federal law, see id.; Pacific Gas & Elec. Co v. Energy Resources Conservation and Development Comm'n, 461 U.S.

190, 204, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); or second, if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" Cippolone, 112 S. Ct. at 2617 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)).

B. The Federal Communications Act

1. Broad Scope of the Act

In the instant case, AT&T asserts that the comprehensive regulatory scheme of the Communications Act is evidence of Congress' intent to preempt the entire field. The express purpose of the Communications Act is to "regulate interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient . . . communication service with adequate facilities [**7] at reasonable charges." 47 U.S.C. § 151 (1988). To that end, the Act governs "all interstate . . . communication by wire or radio and . . . all persons engaged within the United States in such communication," id. § 152(a), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with its communications service, shall be just and reasonable," id. § 201(b).

AT&T, in asserting that the comprehensive nature of the Act demonstrates Congress' intent to occupy the entire field of long-distance telecommunications service, relies primarily on Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968). In Ivy, the Second Circuit considered whether the district court had jurisdiction over a claim for negligence and breach of contract in connection with telephone services provided by a carrier regulated under the Communications Act. The plaintiff alleged grossly negligent and unreasonably delayed installation of telephone lines and grossly negligent operation of those lines, and claimed that federal jurisdiction lay [**8] under the Communications Act. The district court dismissed the complaint for lack of subject matter jurisdiction, stating that the claims of negligence and breach of contract did not arise out of the Communications Act, but rather out of state tort and contract law. The Second Circuit reversed and remanded the case, holding that although the plaintiff's claims were not governed by the Act, such claims were governed by federal common law emanating from the Act. The court stated:

> Questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area.

Ivy, 391 F.2d at 491. Relying on this language, AT&T asserts that because the state law claims brought by CCI relate to communications services, those claims are preempted by the Communications Act.

2. Savings Clause of the Act

The court in Ivy did not address the "savings clause" of the Communications Act, set forth at section 414. The savings clause provides:

> § 414 Exclusiveness of Chapter
>
> Nothing in this chapter [**9] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. At issue, then, is whether the savings clause preserves CCI's state causes of action against AT&T.

[*1516] Courts in other jurisdictions have held that the savings clause preserves causes of action for breaches of duties distinguishable from those created under the Act. For example, in Kellerman v. MCI Telecommunications Corp., 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24 (Ill.), cert. denied, 479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 434 (1986), the Illinois Supreme Court ruled that "state law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." Id. at 1051. In Kellerman, the plaintiffs brought state law claims of fraud and deceptive advertising against the MCI, a provider [**10] of long-distance telephone service. MCI argued that the claims were preempted by the Communications Act, relying, in part, on Ivy. The Kellerman court rejected that argument, and in reviewing the holding of Ivy, as well as the language of the savings clause, stated:

> We believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the act." State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Id. (quoting Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 694 (1st Cir. 1977)).

Similarly, in Bruss Co. v. Allnet Communication Services, 606 F. Supp. 401 (N.D. Ill. 1985), the court held that section 414 preserved the common law claims of the plaintiffs. The plaintiffs had sued Allnet, a provider of long-distance telephone services, alleging common law fraud and violations of Illinois' [**11] deceptive trade and consumer fraud acts. The court found that the duties owed by the defendants under the common law causes of action were different from those duties created by the Communications Act. The court stated:

> None of these causes of actions conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies to preserve these causes of action.

Id. at 411. See also Financial Planning Inst., Inc. v. American Tel & Tel. Co., 788 F. Supp. 75 (D. Mass. 1992). The Financial Planning court clarified the intended function of the savings clause:

> Not only did Congress not express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunications services, but by enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.

Id. at 77.

In the instant case, six of CCI's claims are based on state common law or state statutory [**12] grounds: intentional interference with prospective economic relations; interference with contract; business disparagement; breach of the covenant of good faith and fair dealing; unfair competition; and violation of the Utah Uniform Trade Secrets Act. CCI contends that these claims exist as separate causes of action, and were not created by the Communications Act. AT&T has not cited to any specific sections of the Communications Act which conflict with CCI's state law claims. Additionally, AT&T's contention that these claims are preempted ignores the purpose underlying section 414. In enacting the Communications Act, it is manifest that Congress intended to occupy the field of telecommunications, in order to make available to all people of the United States a rapid, efficient, reasonably-priced communications service, governed by one uniform regulatory scheme. However, inclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action. Hence, while some state law claims may relate to providers of telecommunications [**13] service, but nevertheless stand as independent claims not arising under the Communications Act.

[*1517] Based on the foregoing, this Court holds that section 414 of the Federal Communications Act preserves CCI's state law claims.

II. APPLICATION OF FEDERAL COMMON LAW IN PREEMPTION OF STATE LAW CLAIMS

AT&T also contends that CCI's state law claims are preempted by federal common law, even absent a conflicting provision in the Communications Act. Again, AT&T relies on Ivy, supra. The Ivy court, after concluding that the plaintiffs' claims did not implicate any specific provision of the Communications Act, stated that "where neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law." 391 F.2d at 491. The court in Ivy explained the application of federal common law as follows:

> It seems reasonable that the congressional purpose of uniformity and equality should be taken to imply uniformity and equality of service. . . . It seems to us that the congressional purpose can be achieved only if a uniform federal law [**14] governs as to the standards of service which the carrier must provide and as to the extent of liability for failure to comply with such standards

Id.

AT&T also cites Nordlicht v. New York Telephone Co., 799 F.2d 859 (2d Cir. 1986), as affirming application of federal common law to actions relating to communications services. Nordlicht concerned the rates charged for international telephone service. The court noted that plaintiff did not allege violation of any specific provision of the Communications Act, but ruled that federal common law preempted Nordlicht's claims concerning the international calls. Id. at 862. The court approved and followed Ivy with respect to interstate telecommunications service, but ruled that the same considerations would justify application of federal common law to international telecommunications service.

In light of Ivy and Nordlicht, AT&T argues that this Court should determine that CCI's claims are preempted by federal common law in order to preserve the congressional purpose of uniformity and equality. However, both Ivy and Nordlicht are distinguishable [**15] from the case at bar. Ivy as well as Nordlicht dealt with the provision of telecommunications services. Ivy was an action for negligence and breach of contract in the provision of interstate telephone service, while Nordlicht addressed the rates charged for international telephone

service. Clearly, such matters are governed by the Communications Act.

By way of contrast, in the case at bar, CCI's state law causes of action, which assert business disparagement, fraud, and misrepresentation, do not involve the provision of telecommunications services. Rather, those causes of action concern alleged actions by AT&T as a provider of telecommunications services. The mere fact that AT&T provides services governed by the Act is alone insufficient to bring all of AT&T's actions within the scope of that Act. CCI's claims do not implicate the standards of uniform and equal service that Ivy and its progeny sought to protect under federal common law.

Based on the foregoing, this Court holds that CCI's state law claims are not preempted by federal common law.

III. APPLICATION OF ALLEGED BREACH OF THE COMMUNICATIONS ACT IN PREEMPTION OF STATE LAW CLAIMS

AT&T's final [**16] argument for preemption is based on CCI's Seventh Cause of Action, claiming breach of the Communications Act. That claim does not allege any additional actions or misdeeds by AT&T which would constitute violations of the Act, but rather incorporates by reference the previous 237 paragraphs of the complaint. n1 [*1518] Those paragraphs, however, contain the allegations which form the basis of the state law claims. AT&T asserts that by referencing such allegations CCI has admitted that the very actions alleged in the state law claims constitute violations of the Communications Act, and that those state law claims therefore are preempted. CCI submits that there was no intended admission as claimed, and that it ought to be permitted to amend the Seventh Cause of Action. This Court agrees, and will permit amendment of that cause of action. Accordingly, plaintiff is granted leave to amend the Seventh Cause of Action.

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n1 The Seventh Cause of Action states as follows:

238. CCI incorporates by reference paragraphs 1 through 237.

239. The actions of AT&T as described above, including but not limited to AT&T deliberate violations of applicable tariffs, constitute violations of the Federal Communications Act, including but not limited to 47 U.S.C §§ 201, 202.

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IV. APPLICATION OF THE FILED TARIFF DOCTRINE TO STATE LAW CLAIMS AND FEDERAL CLAIM

AT&T has also moved to dismiss CCI's federal claim, as well as any state law claims that are not preempted, as being barred by the so-called filed tariff doctrine.

Section 203 of the Communications Act requires common carriers to file with the Federal Communications Commission schedules of their charges, as well as any regulations, classifications, and practices affecting such charges. 47 U.S.C. § 203(a). The filed tariff doctrine prohibits such carriers from charging rates other than those on file. See New Jersey Bell Tel. Co. v. Town of West Orange, 188 N.J. Super. 455, 457 A.2d 1196 (Super. Ct. App. Div. 1982). The doctrine has been extended across the spectrum of regulated utilities. n2 The Supreme Court, in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981), explained that "'the considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the [**18] need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" Id. at 577-78 (quoting City of Cleveland v. F.P.C., 525